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Supreme Court, U.S.
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No. 08-568

In The
Supreme Court of the United States

JAY HOWARD ROTHHAUPT,
Petitioner,

v.

RON WAYNE DICKOW, Individually and in his official capacity as Deputy Carroll County Sheriff,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 28, 2008

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QUESTION PRESENTED

Whether the Sixth Circuit's Opinion is in conflict with this Court's holding and the decisions in other Circuits which would allow the introduction of state law to prove the interference with a constitutional right.

PARTIES TO THE PROCEEDING

Jay Rothhaupt is the Petitioner. The Respondent is Ron Dickow, Deputy, Carroll County Sheriff's Office.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit reversing and remanding the judgment of the United States District Court for the Eastern District of Kentucky (No. 04-5868) on the Plaintiff's claim of unlawful arrest.

The order of the United States Court of Appeals for the Sixth Circuit that affirmed the judgment of the United States District Court for the Eastern District of Kentucky (Nos. 07-5425 & 07-5541). The Opinion of the Sixth Circuit is not recommended for full text publication.

JURISDICTION

The final judgment of the district court was entered on March 20, 2007. A timely notice of appeal to the United States Court of Appeals for the Sixth Circuit was filed on April 9, 2007. The judgment of the Sixth Circuit was entered on July 30, 2008. Jurisdiction is proper over this writ pursuant to 28 U.S.C. § 1254(1) because it is an appeal from a final decision of the United States Court of Appeals and is filed within 90 days of the Court of Appeals entry of Order.

This petition is filed under this Court's Rule 10 seeking discretionary review of the Sixth Circuit's Opinion which conflicts with other Circuits and denies individuals freedom against unreasonable searches and seizures.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

42 U.S.C. ¶ 1983 provides: "Every person who, under color of any statute...subjects or causes to be subjected any citizen.... To the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law..."

STATEMENT OF THE CASE

Petitioner was employed at Overlook Systems Technologies, Inc. as a staff engineer, working on projects for Lockheed Martin with top-secret security clearance. (R.21, Rothhaupt deposition, pp. 14-20, JA pp. 103-09)[1]. Petitioner is a trained aeronautical and astronautical engineer who received his education from Penn State and the Airforce Institute of Technology and subsequently taught at the Air Force Academy. (See Plaintiff's resume, attached to Complaint, R.1, Complaint, p. 11, JA p. 17). Petitioner is also a collector, as a hobby. As part of his hobby, he participates in auctions on eBay, an online auction website. (R.21, Rothhaupt deposition, p. 57, JA p. 110).

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[1] "JA" page references are to the Joint Appendix filed in this case at the Sixth Circuit.

On or about July 14, 2001, Petitioner was the winning bidder on eBay of four Pfaltzgraff Tumblers, with a bid of $59.00 plus shipping charges of $7.70 from Seldon and Phyllis Scott, doing business as Hilltop Collectibles (named as Defendants in the original Complaint.) (R.21, Rothhaupt deposition, p. 58, JA p. 111). (The Scotts are not parties to this appeal.)

When Petitioner received the tumblers, he examined the product and realized the tumblers did not conform to the auction description. In fact, the tumblers contained several flaws. Petitioner then contacted the Scotts by email to outline, with specificity, the flaws in the tumblers and his unhappiness with the items. Petitioner exchanged several e-mails with the Scotts in an attempt to resolve the dispute. Ultimately, the Scotts cut off communication with Petitioner and left the issue unresolved.

Prior to the incident which resulted in this lawsuit, Petitioner was visiting his mother in Pennsylvania for a family reunion. In addition he would be able to get some target practice for an upcoming elk hunt. (R.21, Rothhaupt deposition pp. 107-09, JA pp. 111-13). As he was traveling back to Colorado, on or about September 21, 2002, Petitioner drove through Kentucky in order to hand-deliver the goods in question back to the Scotts. (R.21, Rothhaupt deposition pp. 108-09, JA pp. 112-13).

Before going to the Scotts' residence, Petitioner telephoned and informed them he had a package for them. Mrs. Scott answered the phone and did not ask Petitioner to identify himself. (R.21, Rothhaupt

deposition p. 116, JA p. 114). Petitioner headed toward the Scotts' residence for the sole purpose of returning the tumblers. (R.21, Rothhaupt deposition p. 117, JA p. 115).

At the Scotts' residence, Petitioner took the tumblers to the door and requested the sum of $100 in return. (R.21, Rothhaupt deposition p. 121, JA p. 116). After Mr. Scott stated his refusal to pay for the goods, he became angry and demanded to know who Petitioner "was with." The Petitioner verbalized Jay Rothhaupt. (R.21, Rothhaupt deposition pp. 121-122, JA pp. 116-17). Mr. Scott identified himself as a law enforcement officer and told Petitioner to, "stay right there." In the District Court Criminal trial, Seldon Scott admitted he told the Petitioner that he was a law enforcement officer. (Transcript Jury Trial p. 44). Mr. Scott then informed Petitioner he was refusing shipment, and had Mrs. Scott "call the police." Petitioner confirmed that Scott was refusing the package and left the residence. Petitioner was never asked to leave the residence by either Seldon or Phyllis Scott. (R.21, Rothhaupt deposition p. 124, JA p. 118). As Petitioner was leaving the residence, Seldon Scott followed him reciting Petitioner's license plate number. Scott then turned around and went back inside his house. (R.21, Rothhaupt deposition p. 127, JA p. 119).

Petitioner then attempted to continue on his trip back to Colorado. (R.21, Rothhaupt deposition p. 130, JA p. 120). While driving away, Petitioner noticed Scott was following him. (R.21, Rothhaupt deposition p. 133, JA p. 121). After driving for six miles on Highway 71, Petitioner was pulled over by Deputy Dickow. Scott pulled in immediately behind them

after the stop. (R.21, Rothhaupt deposition pp. 135-36, JA pp. 122-23). Deputy Dickow requested to see Petitioner's driver's license and asked about Petitioner's travel plans. (R.21, Rothhaupt deposition pp. 138-39, JA pp. 124-25). Deputy Dickow informed Petitioner he was responding to a trespassing complaint. Scott stated he had told Petitioner to leave his property in front of Dickow and Rothhaupt. (R.21, Rothhaupt deposition p. 141, JA p. 127), Rothhaupt refuted that allegation, and informed Dickow in front of Scott that Scott had actually told Petitioner to "stay right there." (R.21, Rothhaupt deposition p. 141, JA p. 127). Scott then told Dickow that Rothhaupt has done this before. *Id.*

Deputy Dickow then asked for permission to obtain the tumblers from the back seat of the car. Petitioner denied Deputy Dickow permission to enter his car. (R.21, Rothhaupt deposition p. 141, JA p. 127). Deputy Dickow then yelled at Petitioner to exit the car; Petitioner complied immediately. (R.21, Rothhaupt deposition p. 142, JA p. 128). Deputy Dickow then ordered Petitioner to turn around and place his hands on the roof of the car, and Petitioner complied. (R.21, Rothhaupt deposition p. 142, JA p. 128). Deputy Dickow patted Petitioner down, and, finding nothing, ordered Petitioner to turn around and began to interrogate him. (R.21, Rothhaupt deposition p. 143, JA p. 129).

At some point during the questioning, Deputy Dickow asked Petitioner if he had any firearms or illegal drugs in the car. Petitioner replied he was carrying a rifle and explained his reason for having the rifle. (R.21, Rothhaupt deposition p. 144, JA p. 130)

Deputy Dickow then asked Petitioner to stand behind the back of the car, Dickow conferred with Scott outside the hearing of Petitioner. (R.21, Rothhaupt deposition pp. 145-46, JA pp. 131-32) Several minutes later, Deputy Dickow placed handcuffs on Petitioner and asked him again if he had ever been arrested. Petitioner said he had not. (R.21, Rothhaupt deposition p. 146, JA p. 132). When asked where the rifle was, Petitioner told Deputy Dickow the rifle was in the foot well of the rear seat. (R.21, Rothhaupt deposition p. 147, JA p. 133). Deputy Dickow then placed Petitioner in the rear of his police cruiser. (R.21, Rothhaupt deposition p. 147, JA p. 133).

Petitioner was seated in the back of the cruiser and had a clear view of who entered his car and what was removed. He saw Deputy Dickow enter the car and uncover his rifle and remove it. He then began to search through the rifle case. (R.21, Rothhaupt deposition pp. 150-52, JA pp. 134-36). In the meantime, Scott joined in the search of Petitioner's car and removed the box of tumblers. (R.21, Rothhaupt deposition pp. 150-52, JA pp. 134-36).

Eventually, another officer, Deputy Mefford, arrived at the scene. (R.21, Rothhaupt deposition p. 153, JA p. 137). Deputy Mefford also began searching Petitioner's car. (R.21, Rothhaupt deposition p. 153, JA p. 137). At some point, Dickow, Scott and Deputy Mefford began searching through Petitioner's personal papers. (R.21, Rothhaupt deposition p. 157, JA p. 140). Deputy Dickow then got into the cruiser with Petitioner and informed him he was "under arrest for trespassing in the third" and then drove away. (R.21, Rothhaupt deposition p. 158, JA p. 141). Petitioner

was taken to the Carroll County Detention Center where he was held overnight. (R.21, Rothhaupt deposition p. 162, JA p. 142).

Even on direct examination by his own counsel, Deputy Dickow admitted that he arrested Petitioner for criminal trespass in the third degree and harassing communications. (R.95, Trial Transcript, Volume 1, p. 60, JA p. 295). He also admitted that he added the two additional charges of stalking and theft by deception later on. *Id.* According to Rothhaupt, it was not until the next morning that he was informed by Deputy Dickow what the additional charges were against him. (R.21, Rothhaupt deposition pp. 171 & 176, JA pp. 143-44).

After Petitioner posted the $15,000.00 bond for his release and was attempting to reclaim his vehicle and possessions, he was stopped by Deputy Dickow and informed there was a problem with his car. (R.21, Rothhaupt deposition pp. 173–176, JA pp. 422-426). Deputy Dickow told Petitioner the problem was that "drugs" had been found in his car. The "drugs" found in Petitioner's car were: caffeine tablets, aspirin and Ibuprofen. (R.21, Rothhaupt deposition p. 176, JA p. 144). Petitioner had a prescription for the Ibuprofen. (R.21, Rothhaupt deposition p. 178, JA p. 145).

Petitioner was again "arrested and charged" and placed in jail by Deputy Dickow for approximately 10–20 minutes. (R.21, Rothhaupt deposition p. 179, JA p. 146). Petitioner overheard an argument between Deputy Dickow and Deputy Jailer Meadows regarding Petitioner being brought back into jail. (R.21, Rothhaupt deposition p. 180, JA p. 147). Petitioner's

bond was continued at $15,000.00, and he was once again released. (R.21, Rothhaupt deposition pp. 180-81, JA pp. 147-48).

The prescription drug charge and theft by deception charges were dismissed before the Petitioner's criminal trial. Petitioner went to trial on March 7, 2002. The trial judge dismissed the stalking charge at the close of the prosecution's case in chief. At the end of all proof, the Jay Rothhaupt was acquitted on the remaining charges.

REASONS FOR GRANTING THE PETITION

Granting the Petition for Writ of Certiorari will enable this Court to provide much needed guidance on what evidence is allowable when a jury is considering the facts within the arresting officer's knowledge to determine whether a reasonable officer would find probable cause sufficient to make an arrest. In considering the actions of a reasonably prudent person, the jury should be permitted to know what facts the officer knew at the time he made the decision to arrest. In this case, the deputy knew Kentucky law did not permit him to make an arrest when the misdemeanor was committed outside his presence. The Sixth Circuit misinterpreted prior Sixth Circuit precedent in upholding the exclusion of evidence, as well as the jury instruction pertaining to Kentucky law and the deputy's knowledge thereof.

I. The Court Should Have Allowed the Petitioner to Introduce Evidence of Kentucky Law to show the Deputy Lacked Probable Cause.

Deputy Dickow's knowledge of Kentucky law is key to a jury's determination of probable cause. The arrest made by Deputy Dickow based on trespass (and other misdemeanors), lacked probable cause as the alleged misdemeanors did not occur in his presence. Deputy Dickow admitted (in deposition testimony which was not presented to the jury) he was aware of Kentucky law limiting his power to arrest. (R.27, deposition of Ron Dickow, pp. 14-16, JA pp. 162-64). Despite his knowledge of Kentucky law, he arrested Petitioner without authority to do so. This information should have been presented to the jury in considering all facts within the deputy's knowledge at the time of the arrest.

The Sixth Circuit misinterpreted the prior holding of this Court, as well as its own prior decisions, when citing *Pyles v. Raisor*, 60 F.3d 1211 (6th Cir. 1995), for the proposition that "a constitutional claim for false arrest does not arise from the Defendant's [Respondent's] failure to comply with state law, but rather from his actions in arresting the Plaintiff [Petitioner] without probable cause." (Sixth Circuit Opinion, App. 6a-7a). The constitutional claim arises because Petitioner was arrested *without* probable cause and the jury was not permitted to consider evidence critical to a determination of state of mind. In the case submitted to this Court for review, the jury was asked to determine whether probable cause existed to support Petitioner's arrest; yet, the jury was

not instructed as to "the facts within the officer's knowledge"—denying the jury the opportunity to consider what a "prudent person" in these circumstances would have considered probable cause. See *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *see also Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

The arresting officer was a sheriff's deputy, trained under Kentucky law. Deputy Dickow knew Kentucky law prohibited Petitioner's arrest under the circumstances. (R.27, deposition of Ron Dickow, pp. 14-16, JA pp. 162-64). Defendant Dickow is a deputy with the power, under Kentucky law, to arrest for only limited crimes occurring outside his presence. The misdemeanors with which Petitioner was charged were not among those offenses. The limited offenses are: "DUI, domestic violence 4th degree assault, violation of EPO/DVO, and shoplifting TBUT under three hundred." (R.26, deposition of Charlie Maiden, p. 12, JA p. 157). The Carroll County Sheriff's Office Policy and Standard Procedure Manual (Chapter 1, page 7) cites KRS 431.005 and provides this information. (R.32, Plaintiff's Memorandum in Support of Response to Motion for Summary Judgment, Exhibit A, p. 26, JA p. 206).

This Court has defined "probable cause" for an arrest as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo, supra.* Under the circumstances, it is not reasonable to

believe Deputy Dickow thought he had sufficient basis upon which to arrest Petitioner. In fact, he knew he did not have, under Kentucky law, the right to arrest him. With this knowledge, a jury would not have found Deputy Dickow to have had probable cause to arrest Petitioner.

This Court must find the Sixth Circuit's reliance on *Pyles v. Raisor* as wholly incorrect. Prior Sixth Circuit cases have accurately held that state law must be introduced and considered in determining the reasonableness of an officer's conduct. In *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1013-1014 (6th Cir. 1999), as well as *Painter v. Robertson*, 185 F.3d 557, 571 (6th Cir. 1999), evidence of state law was used to demonstrate that an officer could not have had the requisite probable cause at the time of the arrest. In *Estate of Dietrich* the Sixth Circuit affirmed a district court's finding that plaintiffs had established a valid Fourth Amendment claim. Plaintiffs demonstrated the officers were aware of the law giving them permission to carry a concealed weapon; therefore, the arrest for carrying a concealed weapon lacked the probable cause necessary under the Fourth Amendment. See also *Painter v. Robertson, supra* ("that probable cause determinations involve an examination of all of the facts and circumstances within an officer's knowledge at the time of an arrest" citing *Carroll v. United States*, 267 U.S. 132 (1925).) *Dietrich, supra*, was relied upon in *Gardenshire v. Schubert*, 205 F.3d 303 (6th Cir. 2000) for the proposition that a jury must consider all evidence of the officer's state of mind at the time of the arrest.

Using this analysis, if there were factors (in this case, Kentucky law) making it unreasonable for Deputy Dickow to believe that he had probable cause to arrest Petitioner, then, the jury must have been permitted to consider this factor. It was reversible error to prevent the jury from hearing the testimony of Deputy Dickow as to his training and understanding of KRS 431.005. It was also reversible error to prevent the jury from receiving a jury instruction on Kentucky law to determine the reasonableness (or lack thereof) of the deputy's conduct in arresting Petitioner.

Deputy Dickow admitted in his deposition testimony (which was excluded from the trial) that he is responsible for knowing the law and knowing what crimes and in what situations he can arrest. He admitted that under KRS 431.005 he could not have arrested Petitioner because it permitted arrest for a misdemeanor committed outside his presence in very limited circumstances. He even admitted that the "four" charges ultimately placed on Petitioner are not included in those limited circumstances. A jury should have been permitted to hear that Deputy Dickow was aware of the law and knowingly arrested him in violation thereof.

The Sixth Circuit erroneously upheld the district court, citing *Pyles v. Raisor* for a holding that is irrelevant to this case. Other cases more closely analogous to the issue this Court is asked to decide have held that all facts and information in the possession of the arresting officer must be presented to the jury. Similarly, the *Pyles* case was distinguished in *Thomas v. Cohen*, 304 F3d 563 (6th Cir. 2002) for the same reason this Court must reverse and clarify the

law here. In *Thomas*, the Sixth Circuit permitted introduction of state law to establish a constitutional violation—explaining that a federal constitutional violation may occur by interference with a process or a right due under state law. This is precisely the case and argument at hand. Petitioner sought to introduce evidence of the state law, not to prove a case based upon its violation; instead, to prove an interference with Petitioner's rights under the law of which Deputy Dickow was aware at the time he made the arrest. Deputy Dickow's knowledge of the Petitioner's rights under the law at the time of the arrest is most assuredly relevant to the jury's consideration of "all the facts within the officer's knowledge." *Michigan v. DeFillippo, supra.*

II. The Instructions Must Conform to the Facts

During the trial, Deputy Dickow testified as to the two charges for which he arrested Petitioner. On cross examination of Deputy Dickow, he testified that he only arrested Petitioner for 1). criminal trespass third degree; and 2). harassing communications. (R.95, Trial Transcript, Volume 1, p. 36, JA p. 289). In addition, Petitioner's Exhibit Two, which was part of his jail record, included only one charge at the time of arrest-- criminal trespass third degree. Even on direct examination by his own counsel, Deputy Dickow admitted that he arrested Petitioner for criminal trespass in the third degree and harassing communications. (R.95, Trial Transcript, Volume 1, p. 60, JA p. 295). Deputy Dickow notified Petitioner at the time of the arrest he was being arrested for criminal trespass in the third degree. Petitioner did

not learn of additional charges until the next morning. (R.95, Trial Transcript, Volume 1, pp. 88-95, JA pp. 308-15). In the Respondent's case in chief, evidence of only two charges was ever presented. Deputy Dickow was asked by his own counsel about Petitioner's arrest and he stated that he charged him only with: "criminal trespassing third, and also harassing communications." (R.96, Trial Transcript, Volume 2, p. 12, JA p. 380).

Based on the undisputed testimony from Deputy Dickow, undersigned counsel once again requested the trial court limit the jury instructions and delete these two charges from the Jury Instruction number 11 to include only the two charges for which he was initially arrested. (R. 96, Trial Transcript, Volume 2, pp. 34-36, JA pp. 387-89). The trial court denied counsel's request to alter the Jury Instructions. Should this case be remanded, Petitioner seeks a ruling that the instructions specifically conform to the facts and law of this case.

III. The Instructions Were Prejudicial

The Sixth Circuit was very specific in it's first Opinion (case number 04-5868), when it found as a matter of law that Dickow impermissibly relied on Scott's naked assertions without any further investigation. (R.50, Opinion of USCA, pp. 7-8, JA pp. 220-21). The Appellate Court was clear that the main reason the Court believed Dickow's actions were unreasonable in the situation before us was that Dickow was aware that Seldon Scott had a personal interest in the matter, the alleged victim (Scott) had an ongoing dispute with Rothhaupt, and claims of an

interested party involved in a contentious dispute should be viewed in a skeptical light. (*Id.* at 8, JA 221). The Court pointed to *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 309 (6th Cir. 2005) as the legal basis for its opinion. *Id.*

At the jury trial of this matter, the Trial Judge inserted prejudicial language in the Jury Instruction number 11. The prejudicial language was inserted at the end of the definition of "probable cause" and the language inserted was not in line with the facts of this case or the law of the case as the Appellate Court previously held. The very last sentence of the "probable cause" definition is as follows: "[o]nce an officer establishes probable cause, he is under no obligation to continue investigating and may, instead pursue the arrest of the subject." (R.100, 3/20/07, Jury Instructions, p. 14, JA p. 251). Petitioner's counsel preserved this argument for appeal by his contentious objection to the added language and all other objectionable issue with the instructions at the close of proof and before the instructions were tendered to the jury. (R. 96, Trial Transcript, Volume 2, pp. 34-47, JA pp. 387-400). Starting on page 37 of volume 2 of the transcript, undersigned counsel requested that this sentence be stricken and in its place, two sentences from the Appellate Court's previous Opinion be inserted instead. (R. 96, Trial Transcript, Volume 2, pp. 37-47, JA pp. 387-400).

Interestingly, the language that counsel objected and stills objects to was taken from another 6th Circuit Opinion that was decided 5 days prior to the trial in the within action. The case discussed was *Boykin v. Van Buren Township*, 479 F.3d 444 (6th Cir. 2007).

Undersigned counsel tried to stress to the Trial Court that the language from the *Boykin* opinion was improper and prejudicial to the Appellant for several reasons. (R. 96, Trial Transcript, Volume 2, pp. 37-47, JA pp. 387-400). The specific reasons now follow.

The facts of *Rothhaupt vs. Dickow* and *Boykin* are clearly distinguishable and the holding in either one should not be used in the probable cause analysis of the other. In *Rothhaupt*, the Sixth Circuit found probable cause lacking primarily because of the "who," "what," "why" and "how" the information came to the arresting officer Dickow. The Court found that the information relied upon by Dickow was unreliable under the facts within and therefore Dickow would be required to do a further investigation in order to establish "probable cause." (R.50, Opinion, pp. 7-8, JA pp. 220-21). In *Boykin*, the Court held that the source and manner of the communication of the information to the arresting officers to be perfectly credible and uncontroverted at the time of arrest, that probable cause had been established at the time of arrest, and once probable cause is determined, no further investigation is necessary. "If the tip had lacked the indicia of reliability essential to support probable cause, then the officers would have violated the Fourth Amendment by arresting Boykin." *Boykin* at 450, *citing Illinois v. Gates*, 462 U.S. 213, 233 (1983).

In addition, the sentence added to the instructions is confusing and irrelevant as it is referring to an "investigation" that occurs apparently after probable cause is established. In Rothhaupt the jury is to make the determination of probable cause at the time of the arrest and stop right there. The main question that

the jury is being asked for relates to "probable cause" at the time of the arrest. It is therefore logical that anything that happens after "probable cause" is determined is completely irrelevant to that particular analysis. Fundamentally, the cases are very different and adding the language of *Boykin* to the *Rothhaupt* instructions was improper, prejudicial, and warrants reversal of this case.

VI. CONCLUSION

For these reasons, Petitioner asks that this Petition for Writ of Certiorari be granted so that this Court can clarify that state law is admissible in deciding whether a constitutional right has been violated. The Sixth Circuit erroneously applied *Pyles v. Raisor* to exclude evidence of state law and an officer's knowledge of the law on the mistaken belief that such evidence was not relevant to a constitutional claim. In addition, the Court erroneously instructed the jury as to the facts and the law.

Respectfully Submitted,

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